Supreme Court, U.S.
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No. 02-1112

In The Supreme Court of the United States

EDWARD D. JONES & CO., L.P. d/b/a EDWARD JONES, AND PAUL HUSTED,

Petitioners,

v.

ALICE P. KLOSS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Montana

REPLY BRIEF FOR PETITIONERS

LISA A. NIELSEN*
SANDRA B. GALLINI
GREENSFELDER, HEMKER & GALE, P.C.
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-9090

**Counsel of Record*

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REPLY BRIEF FOR PETITIONERS

The United States Supreme Court has previously stricken statutory limitations on enforcement of arbitration agreements. This case presents the appropriate vehicle for the Court to determine whether the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, also prohibits courts from applying common law principles in a manner that allows them to accomplish that which the state legislature cannot. The Montana Supreme Court has enunciated a state policy conditioning enforcement of arbitration agreements contained in adhesion contracts on the oral explanation of the arbitration provision. The Montana Supreme Court refused to enforce the parties' agreement because the agreement at issue was an arbitration agreement which necessarily waived certain state constitutional rights. In fact, Respondent concedes as much on page six of her Opposition when she notes that the question resolved by the court below was "whether Respondent reasonably expected that Petitioners' standard form contract contained waivers of her constitutional and procedural rights." The FAA, however, prohibits states from creating such obstacles to the enforcement of arbitration agreements, whether cloaked in terms of the common law or enumerated in a statute.

I. THIS CASE CONCERNS THE PREEMPTIVE SCOPE OF THE FEDERAL ARBITRATION ACT.

Despite the misplaced focus of Respondent's Opposition, this case is not about the correctness of the Montana Supreme Court's interpretation of its law on adhesion contracts and fiduciary duty. The Montana Supreme Court has the power to establish its common law. Under the Supremacy Clause, however, a state court may not interpret

its law in a manner that conflicts with federal law. U.S. Const. art. VI, § 2, cl. 2. This Court has long recognized that through the FAA, Congress declared "a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). The issue in this case is whether a conflict exists between this federal policy embodied in Section 2 of the FAA, 9 U.S.C. § 2, and the decision below.

This Court has held that the FAA preempts state *statutes* that limit enforceability of arbitration agreements on grounds not applicable to contracts generally. *See e.g.*, *Doctor's Assoc., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (striking down a Montana statute requiring specific written notice of arbitration clause on first page of contract); *see also, Allied-Bruce Terminix Co., Inc. v. Dobson*, 513 U.S. 265, 282 (1995); *Perry v. Thomas*, 482 U.S. 483, 490-91 (1987); *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). As state statutes no longer provide a basis for invalidating arbitration clauses, courts have now turned to the common law to maintain their hostile treatment of arbitration agreements. However, this Court has warned that courts may not "construe [arbitration] agreement[s] in a manner different from that in which it otherwise construes nonarbitration agreements." *Perry*, 482 U.S. at 492 n.9; *accord Doctor's Assoc.*, 517 U.S. at 687; *Allied-Bruce Terminix*, 513 U.S. at 282. Courts may not "rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot." *Perry*, 482 U.S. at 492 n.9.

Despite these warnings, the Montana Supreme Court created an oral notice requirement for the enforcement of arbitration agreements because these agreements necessarily encompass a waiver of the state constitutional rights of access to courts and trial by jury. Respondent claims that the Montana Supreme Court did not rely on the unique qualities of arbitration agreements in its analysis, repeatedly noting that the Court was only analyzing the reasonableness of Kloss' waiver of her constitutional and procedural rights. (Rep't Opp'n Br. at 2, 6-7, 14.) This is a distinction without a difference. By its very nature, an agreement to arbitrate requires the parties to forego these same constitutional and procedural rights in favor of an alternative forum.

There is no doubt that the Montana Supreme Court fashioned its analysis of the parties' arbitration agreement based on the fact that an arbitration agreement was at issue. The Montana Supreme Court determined that oral explanation of the arbitration provision was necessary because the provision effectuated a waiver of Kloss' "right of access to this State's courts, her right to a jury trial, her right to reasonable discovery, her right to findings of fact based on the evidence, and her right to enforce the law applicable to her case by way of appeal." (Pet. App. at App.14.) The Court relied on the fact that Husted "did not explain the arbitration provision (a provision by which Kloss waived at least two constitutional rights, i.e., a right of access to the courts pursuant to Article II, Section 16, and her right to a jury trial pursuant to Article II, Section 26 of the Montana Constitution) to Kloss" and concluded that absent an oral explanation, the clause could not be within Kloss' reasonable expectations. (Pet. App. at App.14.)

The oral notice requirement imposed by the decision below resurrects the same state policy embraced by the Montana statute at issue in *Doctor's Associates*, 517 U.S. at 685. In enacting that statute, the Montana Legislature determined that because arbitration agreements would preclude parties from resolving their disputes in Montana courts, all contracts containing arbitration provisions had to include a notice typed in underlined capital letters on the first page of the contract so that such agreements would be entered into knowingly. *Id.* In this case, by utilizing its common law, the Montana Supreme Court determined that because the arbitration provision included a waiver of access to Montana courts and their procedures, Petitioners must orally explain the arbitration provision before the court will enforce it. (Pet. App. at App.14, App.18.)

The only real difference between the policy put in place by the Legislature and that of the Montana Supreme Court is that the oral notice requirement imposed by the Court is even more arduous. This Court struck down the Montana statute because it applied only to contracts containing arbitration agreements and not to *any* contract. *Doctor's Assoc.*, 517 U.S. at 687. This Court should likewise strike the decision below because its analysis singles out arbitration agreements solely due to the parties' waiver of state constitutional rights of access to the courts and trial by jury. If allowed to stand, this decision will set precedent for the imposition of stricter enforcement standards on arbitration agreements by packaging them in the context of common law contract defenses such as unconscionability. Clearly, such practice will eviscerate the effectiveness of the prohibition of statutorily imposed requirements. Such policy is contrary to Congress' intent

of equal enforcement of arbitration agreements and contracts generally.

II. THIS COURT'S DECISION IN *GREEN TREE FINANCIAL CORP. v. BAZZLE* WILL LIKELY INVOLVE ISSUES PERTINENT TO THE DECISION BELOW.

This Court's decision in *Green Tree Financial Corp. v. Bazzle*, No. 02-634 (cert. granted January 10, 2003), will likely resolve issues directly impacting the decision below. Therefore, if the Court is not inclined to grant the petition, it should at least hold the petition until resolution of *Bazzle*. Respondent argues that *Bazzle* presents a different issue because it involves class actions in arbitration while this case does not. (Resp't Opp'n Br. at 14-15.) Respondent uses a superficial classification for *Bazzle* in an attempt to avoid the true issues presented in that case. Under this superficial reasoning, however, Respondent's reliance on *Ting v. AT&T*, No. 02-15416, 2003 US App. LEXIS 2395 (9th Cir. Feb. 11, 2003), is also misplaced because *Ting* involves class action issues.

The connection between *Bazzle* and the decision below comes not from the style of the case but from the fundamental basis for the holdings in each case. In each case, the court demonstrated its unwillingness to enforce the parties' arbitration agreements as written and instead substituted its own notions of fairness. In *Bazzle*, the South Carolina Supreme Court altered the parties' arbitration agreement and required class arbitration because otherwise the parties would have waived the right to utilize class mechanisms available in court. In this case, the Montana Supreme Court refused to enforce the arbitration agreement altogether because it determined that

Respondent had not knowingly waived the right to resolve her dispute in court with all of its procedural protections. The fact that parties waive the right to certain procedures available in court in arbitration agreements provides the underlying basis for the holdings in both *Bazzle* and the decision below. Thus, this Court will likely decide issues determinative of the decision below in its decision in *Bazzle*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

LISA A. NIELSEN*
SANDRA B. GALLINI
GREENSFELDER, HEMKER & GALE, P.C.
10 South Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 241-9090

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**Counsel of Record*